Supreme Court, U.S.
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No. 09-370

In The
Supreme Court of the United States

WAYNE G. LOVELY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF OF PETITIONER

Contrary to Respondent's contentions, the issues here are whether the Sixth Circuit's blanket denial of a Federal Tort Claims Act ("FTCA") claim under *Feres v. United States*, 340 U.S. 135 (1950) – based solely upon a claimant's remote affiliation with the military – is consistent with this Court's intention in *Feres, and* whether the Sixth Circuit's analysis on the impact such a claim would have on military discipline is appropriate after *United States v. Stanley*, 483 U.S. 669 (1987). Respondent's contentions distort the issues, mischaracterize the Petitioner's injuries, and "spin" the Petitioner into a bad actor – all attempts to distract the Court's focus from the meaningful questions presented by the Petitioner. Respondent's efforts fail and reveal the weakness of its argument.

Respondent's arguments minimize into insignificance the salient questions Petitioner raises about the analysis employed by the Sixth Circuit when examining FTCA claims under *Feres*. If Respondent's contentions are correct, then anyone affiliated with the military, however remote, is engaged in an activity incident to service and therefore, their claim should be barred by the *Feres* doctrine. Respondent – like the court below – mischaracterizes the nature of Petitioner, Wayne G. Lovely's ("Lovely"), injuries and engages in an improper and unnecessary analysis of the military discipline rationale of the *Feres* doctrine in an attempt to justify the Sixth Circuit's overly-broad application of the *Feres* doctrine.

I. RESPONDENT'S CHARACTERIZATION OF LOVELY'S INJURY CANNOT WITHSTAND SCRUTINY.

Respondent's argument that Lovely's asserted injury is the "intentional infliction of emotional distress by a commanding officer in the course of disciplinary proceedings involving a fellow cadet, directly impacting compliance with an ROTC scholarship contract, and calling into question Petitioner's ability to receive a military commission" (Resp. 15), is simply incorrect. Lovely's injury did not occur during the course of a military disciplinary proceeding, nor was Lovely otherwise engaged in an activity incident to his purported service when he was injured.

Instead, Lovely's injury arises out of the intentional infliction of emotional distress caused by LTC Versalle Washington ("Washington") when he: (1) released a protected record to a co-ed student; (2) falsely told other students that Lovely had admitted that he had sexually assaulted the co-ed; (3) told other students that they should support the co-ed and not Lovely; and (4) intimidated one or more of those students who were Lovely's prospective witnesses for the University's administrative proceeding, causing them not to testify on Lovely's behalf at the proceeding. (Resp. 4-5). Lovely's injury is the emotional distress caused by Washington's actions which is unrelated to the outcome of the University Disciplinary Board's hearing, or its after-effects.

Respondent attempts to flip the criteria of *Feres* and its progeny from an examination of the activity of the victim at the time of the injury to the activity of the tortfeasor. Respondent argues that Washington's actions are somehow incident to Lovely's service, and that challenging Washington's actions would involve the sort of prying into military affairs, at the expense of military discipline and effectiveness, that the Court cautioned against in its third rationale of *Feres*.

However, no inquiry into the military discipline rationale is necessary in the case at bar because this case does not involve a matter of military discipline. Washington did not sit on the University's panel at Lovely's disciplinary hearing, he did not report Lovely's alleged academic or non-academic misconduct to the University, nor was he a witness at the University's hearing. In addition, Washington's infliction of emotional distress on Lovely occurred *prior* to the University's non-academic disciplinary hearing. Simply put, the injury was caused in a way that was completely unrelated to Lovely's connection with the military.

Because Lovely's injury was unrelated to any aspect of military discipline, analysis of the third policy rationale of the *Feres* doctrine is wholly inappropriate and, contrary to Respondent's assertions, the Sixth Circuit's analysis of the military discipline rationale was unnecessary – especially in light of the conflicting opinions in *United States v. Shearer*, 473 U.S. 52 (1985) and *Stanley*.

II. THE SIXTH CIRCUIT'S ANALYSIS OF THE MILITARY DISCIPLINE RATIONALE ILLUSTRATES THE SPLIT IN AUTHORITY BETWEEN *SHEARER* AND *STANLEY*.

Respondent acknowledges in its Brief that, in *Stanley,* this Court cautioned against analyzing *Feres'* military judgment rationale in lieu of applying the "incident to service" test and that this Court, in *Johnson*, reaffirmed the "incident to service" test as the proper analysis in all *Feres* cases. (Resp. 14); *Stanley,* 483 U.S. at 681-83; *United States v. Johnson*, 481 U.S. 681, 684-87 (1987). Although Respondent argues that nothing in *Stanley* suggested that the Court viewed its opinion as being in conflict with its decision in *Shearer,* which was issued two years prior, the conflicting approaches highlighted in those decisions have led to uncertainty at the circuit court level. (Resp. 14). Rather than attempting to reconcile the disparity between the two cases over the military discipline rationale, Respondent attempts to sidestep the conflict and states that lower courts have simply continued to examine the applicability of the rationales in addition to – not in place of – the incident to service inquiry. (Resp. 14-15); *see also Regan v. Starcraft Marine*, 524 F.3d 627, 636 (5th Cir. 2008).

The Respondent's argument illustrates the patchwork legal fiction in which the courts currently engage, which at times, such as in the case at bar, leads to inconsistent results. Had the Sixth Circuit followed this Court's most recent decision in *Stanley*, it would not have barred Lovely's claim under the

military discipline rationale of *Feres*. Lovely's claimed injury is simply unrelated to military discipline but, because the Sixth Circuit embarked on a review of the military discipline rationale, it errantly considered the University hearing as an exercise of Washington's purported disciplinary authority over Lovely.

III. THE SIXTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH DECISIONS FROM OTHER CIRCUITS.

As Petitioner showed in his Writ of Certiorari, under the majority approach analysis, a University ROTC student is not a service member within the meaning and intent of *Feres*, absent some qualifying activity or additional authorization. *See, e.g., Regan*, 524 F.3d at 636-38. This is true because ROTC students have a conditions precedent contract and do not have the proper duty status for the *Feres* bar to apply. In *Regan*, the Court recognized the necessity of analyzing both the *status* of an active duty service member on the continuum between performing tasks of an assigned mission to being on extended leave from duty *and* the *activity* in which the claimant was involved when injured, as essential to a proper analysis under *Feres*. *Id.* (Emphasis added).

Respondent argues to the contrary by pointing the Court to cases from other circuits which have concluded that the *Feres* doctrine is applicable to ROTC students. (Resp. 16). However, in each of these

cases, the claimant was involved in military training or a military activity, and the Court looked beyond the claimant's mere affiliation with ROTC and analyzed the activity in which the claimant was involved when injured. Here, the Sixth Circuit looked only at Lovely's affiliation with ROTC and failed to properly analyze the activity in which Lovely was involved in at the time of his injury.

In *Harrison v. United States,* 329 Fed. Appx. 179 (10th Cir. 2009), the claimant's claimed injury was his disenrollment from ROTC. In *Brown v. United States,* 151 F.3d 800 (8th Cir. 1998), the claimant was injured during a military-related training exercise, and his injury aggravated by the negligent treatment of an Army surgeon. In *Wake v. United States*, 89 F.3d 53 (2nd Cir. 1996), the claimant was injured when returning from a military-related activity – a pre-commissioning physical. In *Morse v. West,* 97-1386, 1999 WL 11287 at *1 (10th Cir. Jan. 13, 1999), the claimant was injured while completing educational requirements specifically related to the ROTC program.

In each of the cases, a claimant was involved in a military-related activity when injured. In the case at bar, none of Lovely's injuries occurred while he was involved in any military or military-related activity. Analyzing both the status and activity of the claimant at the time of the injury is essential to a proper analysis under *Feres. Regan,* 524 F.3d at 636-38. In its holding, the Sixth Circuit noted that Lovely was "engaged in the activity of serving as an ROTC cadet

and an ROTC scholarship student." (Resp. 7). Thus, the Court held that Lovely was "*engaged in activity incident to service*", and therefore, his claim was "'barred' by the *Feres* doctrine" simply by virtue of being a student in ROTC. (Resp. 7). (Emphasis added). Accordingly, under the analysis set forth by the Sixth Circuit and urged by Respondent, Lovely's FTCA claim is barred simply because of his affiliation with ROTC. Such a conclusion cannot withstand scrutiny.

In every case cited by Respondent, *Harrison*, *Brown*, *Wake*, etc., the courts examined both the status of the claimant at the time of the injury, that is, his or her relationship to the military – on orders, on duty, or on leave, *and* the activity of the claimant at the time of the injury. (Resp. 7). A myriad of cases allowing reservists and other claimants to pursue claims under the FTCA deny the Respondent's argument and logic. *See, e.g.*, *Elliot v. United States*, 37 F.3d 617 (11th Cir. 1994) (holding that *Feres* did not bar an FTCA action by an injured serviceman and his wife for debilitating injuries they sustained from carbon monoxide poisoning while at their home *on base* at Fort Benning, Georgia); *Regan*, 524 F.3d at 627 (holding that a claimant injured in a boating accident at a military recreational facility that owned the boat was not barred by *Feres* from bringing an FTCA claim); *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980) (holding that an off-duty claimant on a four-day furlough driving a civilian vehicle towards his home off the military reservation was not acting

"incident to service" when he was involved in a collision with a vehicle operated by another serviceman); and *Pierce v. United States*, 813 F.2d 349 (11th Cir. 1987) (holding that claimant's injuries suffered in a motor vehicle collision between him and another serviceman were not incurred incident to service).

As these cases illustrate, courts must analyze the totality of the circumstances in determining whether a case is *Feres* barred. This involves an assessment of the claimant's involvement with the military and the activity of the claimant when injured. It is not enough that Lovely was simply enrolled in the University ROTC program. In order for his claim to be *Feres* barred, he must have been participating in a military or military-related activity at the time of his injury. Even in *Parker* and *Pierce*, where the claimants were injured by other servicemembers, the claimants' claims were not barred solely because they were serving in the military at the time of injury. Instead, the Court considered the totality of the circumstances and determined that the suffered injury was not incident to service.

Had Lovely's claim been given the same treatment by the Sixth Circuit, it would not have been barred under *Feres*. These cases illustrate that other circuits have allowed FTCA claims by claimants with more intricate ties to the military – including claims brought by active duty members and reservists. If a claimant can be on active duty or a reservist and still bring a successful FTCA action, the Sixth Circuit cannot properly deny a FTCA claim brought

by an ROTC student solely because of that student's status in ROTC.

IV. RESPONDENT MISCHARACTERIZES OTHER CIRCUITS' TREATMENT OF *MAJOR* AND DOWNPLAYS ITS PRECEDENTIAL VALUE.

Out of one side of its mouth, Respondent complains that Lovely quotes a test first established by the Sixth Circuit over two decades ago in *Major v. United States*, 835 F.2d 641 (1987). (Resp. 13). In so doing, Respondent implies that the test in *Major* is old, outdated, and no longer good law in the Sixth Circuit. (Resp. 13). However, even a cursory review of the Sixth Circuit's decision here, shows that the Sixth Circuit relies heavily on *Major* in formulating its opinion in this case.

Out of the other side of its mouth, Respondent argues that *Major* has been favorably cited by other circuit courts. (Resp. 13-14); *see, e.g., Stewart v. United States*, 90 F.3d 102 (6th Cir. 1996); *Persons v. United States*, 925 F.2d 292, 296 n.7 (9th Cir. 1991); *Shaw v. United States*, 854 F.2d 360, 364 (10th Cir. 1988). Respondent's assertion is misleading. In *Stewart*, *Persons*, and *Shaw*, instead of embracing *Major* as written, these courts performed an examination of the totality of the circumstances surrounding the claimants' injuries, including an analysis of the nexus between the claimant's affiliation with the military and the activity in which he was

involved when injured, and ignored the language in *Major* holding that a claim should be barred "without regard to [the] . . . location . . . status . . . or nexus . . . from which it arose." *Major*, 835 F.2d at 644-45. While Respondent concedes that the other Courts of Appeal apply a totality of the circumstances approach, Respondent curiously persists in its contention that the Sixth Circuit's approach dismissing these factors is consistent with the approach taken by other circuits. (Resp. 12); *see, e.g., McConnell v. United States,* 478 F.3d 1092, 1095 (9th Cir.), *cert. denied*, 128 S.Ct. 649 (2007); *Schnitzer v. Harvey,* 389 F.3d 200, 203 (D.C. Cir. 2004); *Pringle v. United States,* 208 F.3d 1220, 1224 (10th Cir. 2007); *Richards v. United States,* 176 F.3d 652, 655 (3rd Cir. 1999); *Whitley v. United States,* 170 F.3d 1061, 1070 (11th Cir. 1999); *Day v. Massachusetts Air Nat'l Guard,* 167 F.3d 678, 682 (1st Cir. 1999); *Stewart,* 90 F.3d at 104-5; *Miller v. United States,* 42 F.3d 297, 301 (6th Cir. 1995); *Stevenson v. Stone,* 21 F.3d 159, 162 (7th Cir. 1994).

These other circuit courts recognize that a proper analysis of a FTCA claim under the *Feres* doctrine requires the circuit courts examine the status, location, and activity in which a claimant is involved when injured. However, the Sixth Circuit looked only to Lovely's remote affiliation with the military. Here, such an analysis was lethal to Lovely's claim because according to the Sixth Circuit Court, by simply being an ROTC cadet, Lovely was engaged in an activity incident to service and, therefore, his claim was

automatically barred. Under this logic, a claim brought by any member of the armed forces would be barred simply because the service member is serving in a branch of the United States military. Such an approach is contrary to every other circuit and is contrary to the incident to service and totality of circumstances test.

V. THE SIXTH CIRCUIT IMPROPERLY ANALYZES *FERES'* SECOND RATIONALE.

Finally, as this Court knows, "the existence of . . . generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries, [and] . . . the primary purpose of the FTCA 'was to extend a remedy to those who had been without; if [the FTCA] incidentally [benefitted] those already well provided for, it appears to have been unintentional.'" *Johnson*, 481 U.S. at 689-90. The Sixth Circuit and Respondent's analysis confuses Lovely's affiliation with ROTC with this Court's recognition of Congress's statutory disability and death benefits. In addition, the Respondent's argument further amplifies that error because it mistakenly contends that Lovely's enrollment and scholarship in ROTC is tantamount to engaging in military activity.

Lovely simply was not entitled to any statutory disability or death benefits as part of his enrollment in ROTC. Accordingly, absent his claim under the FTCA, Lovely has no remedy for his injury. The

primary purpose of the FTCA – to extend a remedy to those without one – is frustrated by the Sixth Circuit's blanket application of the *Feres* doctrine and misapplication of the doctrine's second rationale. This result cannot be what the Court intended when it created the *Feres* bar.

CONCLUSION

For all of the foregoing reasons herein, the Court should grant Lovely's Petition for Writ of Certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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